IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1322

CAROLYN BRADLEY, *et al.*,

Petitioners,

vs.

THE SCHOOL BOARD OF THE CITY OF RICHMOND, *et al.*

REPLY BRIEF FOR PETITIONERS

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I

Respondents urge at length that Section 718,[1] which became effective over 17 months ago, should not now be applied to this case because such an application would be "retroactive". They maintain that federal statutes should not be applied to any cases or appeals pending when the statutes became effective, even though such cases may not be finally decided until many years after that effective date.

Respondents' assertion is not a novel one: their position has been fully litigated, and resoundingly rejected, by this Court in the past. In *Housing Authority of City of Durham* v. *Thorpe*, as here, the lower court held that a new federal law should not be applied to litigation pending on appeal. *Compare* 271 N.C. 468, 470, 157 S.E. 2d 147, 149 (1967) *with Thompson* v. *School Board of City*

[1] Section 718 is now codified in 20 U.S.C. § 1617.

of Newport News, 472 F. 2d 177 (4th Cir. 1972). In *Thorpe,* as here, reliance was placed on *Greene* v. *United States,* 376 U.S. 149 (1964) by those opposing application of the new law. *Compare* 271 N.C. at 470-471, 157 S.E. 2d at 149-150 *with* Respondents' Brief, pp. 10-13. In *Thorpe,* as here, the respondents construed *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801) as precluding application of the new law. *Compare* Brief for Respondents in No. 1003, 1967 Term, p. 27, *with* Brief for Respondents, pp. 15-18. Yet in *Thorpe* this Court rejected the identical arguments reasserted in this case, and held unanimously that the new federal law must be applied to that pending appeal. *Thorpe* reiterated it was the "general rule" that new laws must be applied to all cases pending on appeal, 393 U.S. at 281, and that *Greene* was an "exception" needed to prevent manifest injustice on the special facts of that case. 393 U.S. at 282. Respondents offer no reason why that exception should now become the general rule.

Respondents suggest that the sole reason this Court applied the new law in *Thorpe* was that Mrs. Thorpe, at the time of the decision, still had not been evicted from her apartment. Respondents' Brief, p. 19. The majority in *Thorpe* reaffirmed the rule that new laws were to be applied to pending appeals without referring to the fact that Mrs. Thorpe had not been evicted. That fact was noted only to show the unreasonableness of the Housing Authority's refusal to comply voluntarily with the new law. Only Mr. Justice Black, in a concurring opinion, gave significant weight to this factor, and he objected that the rest of the Court, in discussing the more general question of applying new laws on appeal, had used "a cannon to dispose of a case that calls for no more than a pop gun." 393 U.S. at 284. Mr. Justice Black correctly understood the difference between his concurring opinion

and the majority opinion joined in by the other eight members of the Court; the restricted construction of *Thorpe* urged by Respondents is precisely the narrow ground on which Mr. Justice Black urged unsuccessfully that the Court base its opinion.

Respondents further urge that new statutes are applied to pending cases only where there is "a clear legislative intent" to affect such cases, and that a finding of such legislative intent was crucial to the decision in *Thorpe* and related cases. Respondents' Brief, pp. 11, 18. This is simply wrong. In *Thorpe* the new law was a HUD circular regarding eviction procedures in federally assisted public housing; the *Thorpe* opinion contains absolutely no discussion of whether those who drafted the circular intended to cover pending litigation. 393 U.S. at 281-284. So, too, in *United States* v. *Alabama*, 362 U.S. 602 (1960), the new statute was a provision of the 1960 Civil Rights Act authorizing suits by the United States against a state. This Court applied the new statute to that pending appeal without any reference to the legislative history of or congressional intent behind the 1960 Act. See Petitioners' Brief, p. 12. In *Ziffin* v. *United States*, 318 U.S. 73, (1943), the new statute was an amendment to the Interstate Commerce Act. This Court applied the change to a case pending before the Interstate Commerce Commission on the date of its enactment, without purporting to consider whether Congress intended the new law to apply to such already pending matters.

Furthermore, the application of Section 718 to the instant case would not be a "retroactive" application, properly so called. Such application would be truly retroactive only if, in the case involved, the question of attorneys' fees had been litigated and all appeals exhausted before Section 718 became effective. See, e.g., *Williams* v. *Kimbrough*,

415 F.2d 874 (5th Cir. 1969), *cert. denied* 396 U.S. 1061 (1970).[2] Whether a final order regarding legal fees could be *reopened* because of Section 718 is a question not presented in the instant case, and which this Court is not required to decide.

Respondents suggest there may be a substantial number of ongoing school desegregation cases in which the question of legal fees has never been resolved, and they speculate that in some of these cases it might be unfair to award counsel fees. Respondents' Brief, pp. 20-30. The district courts, however, have ample authority to deal with any such problem. Attorneys' fees under Section 718 may be denied if "special circumstances would render such an award unjust", *Northcross* v. *Board of Education of Memphis,* 412 U.S. 427, 428 (1973), and a court of equity has similar discretion where legal fees would otherwise be appropriate for a private attorney general or under *Hall* v. *Cole,* 412 U.S. 1 (1973). In the instant case, however, the District Court expressly held there were no special circumstances which might render unjust an award of legal fees. 140a.

II

A majority of the Court of Appeals below held Section 718 inapplicable to the instant case on the alternative ground that it was not awarded "upon the entry of a final order" against the Respondents, 187a-188a. The error of this holding was dealt with in Petitioners' Brief, pp. 10-11. Respondents, apparently recognizing that the position of the Court of Appeals is inconsistent with the language of

[2] Similarly, *Thorpe* would have been a retroactive application, not if Mrs. Thorpe had been evicted before this Court's decision, but only if all appeals had been exhausted and certiorari denied before the HUD circular was issued.

Section 718 and the facts of this case, have abandoned that position and declined to offer any argument in support of this aspect of the Fourth Circuit's opinion.

III

Respondents do not seriously contest Petitioners' argument that, under *Hall* v. *Cole*, 412 U.S. 1 (1973), a plaintiff who successfully sues to end unlawful or unconstitutional government action should in general have his counsel fees paid by the defendant if the lawsuit conferred a significant benefit upon the public at large or upon the government itself. See Petitioners' Brief, pp. 21-28. Similarly, Respondents do not dispute Petitioners' contention that the defendant should pay the legal fees of a successful plaintiff where the litigation served to vindicate important congressional or constitutional policies. See Petitioners' Brief, pp. 28-34. While tacitly conceding that counsel fees should generally be awarded in successful civil rights litigation, Respondents urge that an *exception* should be made for school desegregation cases. Respondents argue that this Court should adopt, in litigation enforcing the commands of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), a special rule "more restrictive than might otherwise be appropriate in *other* suits brought under Section 1983." Respondents' Brief, p. 21.

It is difficult to understand why school boards which persist in defiance of the Constitution until directed to desist by the federal courts should be exempted from paying the legal fees of the victims of that unlawful conduct, especially when all other state and local agencies must pay such fees in similar circumstances. The affirmative obligation of school officials to devise effective methods of desegregation is no new development; eighteen years ago this

Court declared that school officials were responsible for "solving" the practical problems of desegregation, *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, 299 (1954), and eight years ago in this very case this Court declared that "[d]elays in desegregating school systems are no longer tolerable." *Bradley* v. *School Board of Richmond*, 382 U.S. 103, 105 (1965). See also *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969). Neither can it be asserted that the rights involved in these cases are relatively unimportant; on the contrary, the stigma of a second-class segregated education is certain to stunt the intellectual and spiritual development of black students "in a way unlikely to be undone." *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954). Nor are school desegregation cases so easy to litigate or so short of duration as to render legal fees unnecessary; almost two decades of experience under *Brown* has shown all too clearly that such litigation is often fiercely contested and that adequate relief is often won only after years of effort. Of all types of civil rights litigation in which legal fees might be sought under *Hall* v. *Cole* or the private attorney-general theory, the claim for such fees is undoubtedly strongest in a case such as this.

Alternatively, Respondent urges that even if *Hall* v. *Cole* and the private attorney general theory are applicable to school litigation, it would not be "wise" for this Court to so hold since certain future school cases will be controlled by Section 718. Respondents' Brief, pp. 26-30. This litigation presents a case or controversy, and unless legal fees are awarded on some other basis the applicability of *Hall* v. *Cole* and the private attorney general standard must be considered and decided. Certiorari was appropriate in this case because of the conflict between the opinion of the Fourth Circuit and eleven other lower court decisions

regarding the private attorney general rule. Petition for Writ of Certiorari, pp. 18-27. That conflict should not continue to languish unresolved. Respondents would have this Court conclude that, while Petitioners might have been entitled to legal fees if Section 718 had not been enacted, Congress' decision in 1972 to *assure* the award of legal fees should have the effect of *preventing* the award of fees in all cases arising before Section 718 became effective. Such a restrictive result would hardly be consistent with the purposes of Section 718.

IV

Respondents urge throughout their brief that the award of counsel fees in this case, or in general, is unfair because of "uncertainty" which existed prior to this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). Petitioners maintain that any such uncertainty is irrelevant to the award of fees in this or any other case. Even if it were relevant, whether a particular school board's conduct was the result of any uncertainty, or due to other causes, is a question of fact peculiar to each case. There is nothing in the record in this case to indicate that the school board failed to act for two years after *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968) because of any such uncertainty. There is nothing in the record in this case to indicate that, after the Fourth Circuit's decision in *Swann,* the school board continued to propose unacceptable plans because of uncertainty as to whether this Court would grant certiorari in *Swann.*

It was never claimed in the District Court, and no court has ever held, that the actual reason the school board took no action in the fact of *Green* in 1968 was that it had no

complaints or did not know what to do. The school board never asserted that it spent the 22 months after *Green* trying to formulate a new desegregation plan; once litigation commenced, the board was able to devise its first proposed plan in 41 days, and its second in 27. On the contrary, as late as March, 1970 the school board was still equivocating as to the meaning of *Green,* p. 115a, and the District Court found that the general attitude of the authorities was that they would take no steps to establish a unitary school system except under court order. P. 133a, see also p. 114a n.1. Whatever "uncertainties" existed before or after *Swann* were as to the tools which the courts could use when state officials failed to comply with the law. The tools available to school officials themselves are limited only by their imagination and practical considerations; school boards have always been free to adopt any techniques which worked, even though some might be beyond the power of the federal courts to order. See *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971); *McDaniel* v. *Barresi,* 402 U.S. 39 (1971). The goal to be achieved has always been clear—the creation of a unitary school system. Compare *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968). Any uncertainty on the part of the board as to how to achieve a unitary system cannot excuse the board's decision not to try to achieve such a system at all.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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